

EXHIBIT F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PEAJE INVESTMENTS, LLC,
Movant, Appellant,
-vs- Case No. 16-2377
ALEJANDRO GARCIA-PADILLA, ET AL,
Respondents, Appellees.

PEAJE INVESTMENTS, LLC
Movant, Appellee,
-vs- Case No. 16-2430
ALEJANDRO GARCIA-PADILLA, ET AL,
Respondents, Appellees,

FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,
Movant, Appellant.

DIGITAL TRANSCRIPTION
ORAL ARGUMENT HELD BEFORE
JEFFREY R. HOWARD, CHIEF JUDGE
O. ROGERIEE THOMPSON, CIRCUIT JUDGE
WILLIAM J. KAYATTA, JR., CIRCUIT JUDGE
WEDNESDAY, JANUARY 4, 2017

Job No. 4622

1 UNITED STATES COURT OF APPEALS
2 FOR THE FIRST CIRCUIT
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4 PEAJE INVESTMENTS, LLC,
5 Movant, Appellant,
6 -vs- Case No. 16-2377
7 ALEJANDRO GARCIA-PADILLA, ET AL,
8 Respondents, Appellees.

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10 PEAJE INVESTMENTS, LLC
11 Movant, Appellee,
12 -vs- Case No. 16-2430
13 ALEJANDRO GARCIA-PADILLA, ET AL,
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1 ASSURED GUARANTY CORPORATION; ASSURED GUARANTY

2 MUNICIPAL CORPORATION,

3 Plaintiffs, Appellees,

4 -vs- Case No. 16-2431

5 COMMONWEALTH OF PUERTO RICO, ET AL,

6 Defendants, Appellees

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8 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,

9 Movant, Appellant

10 -----

11 ALTAIR GLOBAL CREDIT OPPORTUNITIES FUN (A), LLC,

12 ET AL,

13 Movants, Appellants,

14 CLAREN ROAD CREDIT MASTER FUND, LTD., ET AL,

15 Movants,

16 -vs- Case No. 16-2433

17 ALEJANDRO GARCIA-PADILLA, in his official

18 capacity as the Governor of Puerto Rico, et al,

19 Respondents, Appellees

20 -----

21 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,

22 Movant, Appellant

23 -----

24

25

1 BRIGADE LEVERAGED CAPITAL STRUCTURES FUND, LTD.,

2 ET AL

3 Plaintiffs, Appellees,

4 -vs- Case No. 16-2437

5 ALEJANDRO GARCIA-PADILLA, in his official

6 capacity as the Governor of Puerto Rico, et al,

7 Defendants, Appellees

8 GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO,

9 Defendant,

10 -----

11 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,

12 Movant, Appellant.

13 -----

14 NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION,

15 Plaintiff, Appellee,

16 -vs- Case No. 16-2438

17 ALEJANDRO J. GARCIA-PADILLA, et al,

18 Defendants, Appellees,

19 -----

20 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,

21 Movant, Appellant.

22 -----

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25

1 US BANK TRUST NATIONAL ASSOCIATION,

2 Plaintiff, Appellee,

3 -vs- Case No. 16-2439

4 ALEJANDRO GARCIA-PADILLA, in his official

5 capacity as the Governor of Puerto Rico, et al,

6 Defendants, Appellees

7 -----

8 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,

9 Movant, Appellant.

10 -----

11 DIONISIO TRIGO-GONZALEZ, ET AL,

12 Plaintiffs, Appellees,

13 CARMEN FELICIANO VARGAS, ET AL,

14 Plaintiffs,

15 -vs- Case No. 16-2440

16 ALEJANDRO GARCIA-PADILLA, in his official

17 capacity as the Governor of Puerto Rico, et al,

18 Defendants, Appellees

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20 FINANCIAL OVERSIGHT AND MANAGEMENT BOARD,

21 Movant, Appellant.

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1 INDEX PAGE

2 WITNESS: PAGE

3 (None.)

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5 EXHIBITS

6 EXHIBIT DESCRIPTION MARKED

7 (None.)

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1 Wednesday, January 4, 2017

2 THE CLERK: The first case today is
3 16-2377, Peaje Investments LLC versus Alejandro
4 Garcia-Padilla et al and consolidated cases. And
5 Number 16-2437, Brigade Leveraged Capital Structures
6 Fund V Alejandro J. Garcia-Padilla et al and
7 consolidated cases.

8 MR. BRUNSTAD: Good morning, your
9 Honor, Eric Brunstad on behalf of Peaje Investments.
10 If I may have about three minutes for rebuttal time,
11 your Honor?

12 THE COURT: Yes.

13 MR. BRUNSTAD: Thank you. First of
14 all, we appreciate being here on expedited review.
15 And in the time that I have this morning I'd like to
16 touch upon three things. The first is the harm that
17 Peaje is suffering as a result of the taking of its
18 collateral.

19 The second is why adequate protection
20 is the correct standard of cause here.

21 And the third is why the District
22 Court erred in failing to hold a hearing.

23 Focusing on harm, Peaje holds
24 \$63 million in limited recourse bonds. By limited
25 recourse, I mean that ordinarily Peaje can look only

1 to its collateral, the Toll Revenues to be paid.
2 When we started back in May of 2016, Peaje's
3 collateral consisted of two buckets. The first
4 bucket consisted of cash equal to about 10 percent
5 of the principal and interest outstanding on the
6 bonds, on deposit with the fiscal agent. The second
7 bucket is the future Toll Revenues.

8 Now here we are in January, the second
9 payment; I understand first payment in July, second
10 payment now has been made from the cash. The cash
11 is gone or almost gone. That money is gone. So all
12 we have to look forward to now is the future
13 payments, the future Toll Revenues, which we don't
14 know that much about. We don't know how much they
15 are, what they're actually going to be. We think
16 they're going to be insufficient to both cover the
17 future payment obligations and to make up for what
18 has been taken. But the harm is --

19 THE COURT: Staying right with that,
20 why is that the standard? I read your briefs below
21 and on here you consistently say that the future
22 revenue stream won't be enough to cover all of the
23 obligations, not just the debt obligation but also
24 refunding, in effect, collateral. And as I
25 understand the adequate protection rule which you'd

1 like us to apply, we don't look at that. We
2 actually look -- if a creditor is over-secured we
3 will get whether the collateral will be impaired
4 down to the point to eliminate what the Court's call
5 an equity cushion. And I don't see you ever having
6 argued that either below or even in any brief to us
7 on appeal.

8 MR. BRUNSTAD: Yes, your Honor. But
9 the critical point there is that it's a question of
10 fact. It depends on the value of the future
11 revenues. They --

12 THE COURT: Can you point to anything
13 in your filings with the District Court where you
14 proposed, where you even alleged that the diminution
15 in the value of the collateral would be enough to
16 take you down below -- in other words, not just
17 impaired the collateral, but reduce it so much that
18 it would impair the debt?

19 MR. BRUNSTAD: Well, we argued over
20 and over again that that was what was going to
21 happen.

22 THE COURT: I didn't see it. Can you
23 point me towards where you --

24 MR. BRUNSTAD: On the (inaudible),
25 your Honor, I will give you the page cites to our

1 brief. I don't have it right in front of me, but I
2 will do that.

3 But the point is that it is a question
4 of fact, and we never had a hearing. And I also
5 want to point out, it is the debtor here, the
6 Commonwealth's burden to show that there is no harm
7 to us. It's not our burden to show that when they
8 take our collateral and spend it, that we will be
9 harmed. It is their burden to show that it won't
10 be. When they take your cash, when they take your
11 property, and they dissipate it or they spend it, it
12 is their burden to show that we're being adequately
13 protected nonetheless. And the adequate protection
14 standard is very simple. It comes from Morales and
15 it's that they must basically show there's a
16 reasonable assurance of a suitable replacement.

17 They have to show that the cash today
18 is being replaced by something, and they have to
19 show first when they're going to stop taking our
20 collateral, because if they keep taking our
21 collateral infinitely into the future we'll never be
22 paid, we're obviously harmed, and --

23 THE COURT: Back to the burden
24 question that you just touched on and explain to me
25 the basis for your assertion that the burden would

1 be on them given that the statute -- I know we start
2 out with language that says "For cause shown".

3 MR. BRUNSTAD: Correct, your Honor.

4 THE COURT: That "shown", I think
5 suggests that the party seeking relief will show
6 cause, which kind of sounds like you have some
7 burden here.

8 MR. BRUNSTAD: We do. We have a
9 burden of showing we have a secured interest. We
10 have a burden of showing that they are taking our
11 property and spending it. Those are undisputed
12 facts. We've established our burden. The burden
13 that exists for them to show, that their taking of
14 our property and dissipating it is not causing us
15 harm.

16 This standard of cause is borrowed
17 from Section 362 of the Bankruptcy Code. Section
18 362 says that relief from the automatic stay in
19 bankruptcy may be granted, including for lack of
20 adequate protection.

21 Then the concept of the cause is
22 borrowed there into PROMESA here. We take the
23 subtle meaning of that concept here. The subtle
24 meaning includes that they have the burden of
25 showing that they're taking our property and

1 spending it is not causing us harm. That's what
2 adequate protection means. The burden of proof is
3 baked into that very concept.

4 Now there's an important reason why
5 that must be the standard here. PROMESA itself bars
6 us from asserting a remedy to stop them from taking
7 our property. The statute itself prevents us from
8 asserting a remedy. That in and of itself generates
9 a conflict with the Constitution, with the Fifth
10 Amendment, where somebody is continually taking the
11 property and you can do nothing about it.

12 Ordinarily we have all kinds of remedies that are
13 being prescribed by the statute. To avoid a
14 conflict with the Constitution we must have a
15 mechanism that allows us to show that they -- we're
16 entitled to relief from the stay unless they can
17 show --

18 THE COURT: But see, we have not
19 confirmed, you just said we must have a mechanism
20 that allows us to show.

21 MR. BRUNSTAD: Correct.

22 THE COURT: All right. So go back to
23 the question. How much do you have to show and
24 when?

25 MR. BRUNSTAD: Yes.

1 THE COURT: And so what do you say to
2 the point that when you take the word "Shown" and
3 you add in the policy considerations that we're
4 talking about, a temporary stay, we're talking about
5 a desire to reduce suits, why wouldn't it
6 potentially lead to an argument that before a suit
7 is going to be allowed a creditor needs to come in
8 and at least make a prima facie claim that its
9 actual debt obligation is being impaired by the
10 reduction of collateral --

11 MR. BRUNSTAD: Yes.

12 THE COURT: -- below -- you have to at
13 least claim that in your motion.

14 MR. BRUNSTAD: Oh, we did. And in the
15 end it's the same burden we would have under Section
16 362. Under Section 362 we must show cause, same
17 idea, all we have to do is come in and say "We have
18 a lien, a security interest in this property that's
19 undisputed." Our collateral is being taken and
20 spent. That is undisputed. The burden then shifts
21 to them to demonstrate.

22 THE COURT: But there aren't -- there
23 are bankruptcy cases, are there not, that say that
24 even in that situation, the creditor still has the
25 burden of showing that there is no equity cushion?

1 It's not -- it's not cut and dry; am I right?

2 MR. BRUNSTAD: But actually in this
3 context it is. First of all, they refuse to tell us
4 what the future revenues are going to be. We don't
5 have that information. And if we don't have -- if
6 we -- if we -- the cash was supposed to accumulate.

7 The cash, as we understand it, is now gone. There
8 will be no money there to make the July payment
9 coming up in 2017, unless they turn those revenues
10 back on. It takes time for those revenues to
11 accumulate.

12 On pages 34 and 35 of our brief, we
13 trace the history of the adequate protection concept
14 to the Morales holding case that Congress adopted
15 when it crafted the adequate protection concept.
16 And there the Court was very clear the adequate
17 protection concept clearly encapsulates this idea
18 that if you take someone's property, a promise of
19 future payment, which is all that they're offering
20 here, a promise of future payment from the future
21 revenues is never adequate protection unless they
22 can show, and it's their burden, that the future
23 revenues are so great that it doesn't make a
24 difference.

25 Picture the apple farm, where the

1 farmer has apples, grows apples and they're there
2 and the bank has a lien on the apples to secure a
3 debt. The farmer sells the apples and now has cash.
4 If the farmer spends the cash what does the creditor
5 have to look to? Nothing. The prospect of future
6 apples that may or may not be grown? Or it might be
7 okay if the farmer can show in bankruptcy "I'm going
8 to grow all these future apples and they're going to
9 have such a great value that it doesn't matter that
10 I just spent all of your cash from this crop, it's
11 okay to make you wait."

12 But when the farmer spends the cash,
13 sells the apples and spends the cash, which is what
14 they have done here, they then have to come forward
15 and show you that there is a reasonable prospect of
16 a suitable substitute, a suitable replacement that
17 will be provided.

18 THE COURT: Let me ask you a question
19 about that. If Congress thought that -- that
20 the -- sort of the bankruptcy code way of dealing
21 with this in terms of adequate security was so
22 utterly critical when we're dealing with a sovereign
23 or somebody with the ability to tax or otherwise
24 raise revenue through fees, tolls, et cetera, why do
25 you suppose they didn't put that language in?

1 MR. BRUNSTAD: Two reasons. One is --

2 THE COURT: What I'm really asking is
3 how much flexibility do we have?

4 MR. BRUNSTAD: Yes. I would suggest
5 even though they said cause and didn't specify it,
6 the flexibility I think has to be cabined within the
7 adequate protection concept. And here's why:

8 The adequate protection concept is
9 itself based on the Fifth Amendment. The adequate
10 protection concept recognizes that when a debtor
11 files for bankruptcy the automatic stay kicks in and
12 prevents the secured creditor from exercising its
13 rights when its collateral is being dissipated. And
14 Congress rightfully chose that -- this came from a
15 case law before Congress did this in 1978, that
16 where the collateral is being taken or dissipated or
17 is depreciating in value in bankruptcy, the secured
18 creditor has a constitutional right to protection,
19 otherwise the automatic stay itself affects the
20 taking.

21 THE COURT: But if -- but if your --
22 if the Fifth Amendment argument hinges on the way
23 the reserve account is set up, the way the
24 expenditures are made, isn't that essentially a
25 contract claim as opposed to a property claim?

1 MR. BRUNSTAD: No. Security
2 Industrial Bank, the Supreme Court decision, it's
3 cited on page 1 of our reply brief citing the
4 Radford (ph) case, another other Supreme Court case,
5 illustrate that a lien in collateral is a property
6 right, not a contract right, it's a property right.
7 A lien is a purchase. Under Article 9 of the
8 Uniform Commercial Code, a security interest is a
9 purchase interest in the collateral, it's an
10 ownership interest --

11 THE COURT: But the payment that
12 you're talking about is a -- is a twice a year
13 payment --

14 MR. BRUNSTAD: Correct.

15 THE COURT: -- that is a result of
16 contract.

17 MR. BRUNSTAD: That's just how the
18 collateral is to be distributed.

19 THE COURT: Yeah, so I'm talking about
20 the revenue stream.

21 MR. BRUNSTAD: In bankruptcy, it is
22 true, if we were in a bankruptcy proceeding, and
23 we're probably going to get -- go there, there will
24 be another stay, one more delay, if -- in the
25 bankruptcy proceeding it is true that debtors have

1 some leeway to alter the terms of payment, but
2 that's not what we're talking about here. We're
3 talking about the security of payment, the
4 collateral itself, the property. And when it is
5 dissipated, when it is spent, they have to show in
6 order to be able to spend it, that it's not causing
7 us any harm. Why? Because we are prohibited from
8 the platform of the PROMESA of stay from exercising
9 our rights.

10 So to preserve the Fifth Amendment
11 concern, and applying the Canon of Constitutional
12 Avoidance, the Court should interpret the cause
13 standard under PROMESA to be the same as the cause
14 standard under Section 362 of the Bankruptcy Code to
15 avoid that conflict with the Constitution where they
16 could just continue to take the collateral for as
17 long as they want and we can do nothing about it.
18 The standard should be the same. It should also be
19 the same under the Borrowed Statute Canon, because
20 the -- the cause standard under the bankruptcy code
21 was imported here and so, the subtle meaning goes
22 with it, including the requirement of adequate
23 protection.

24 Adequate protection requires that they
25 show that a suitable substitute will be provided for

1 what is being taken. They never showed that below,
2 we never had a hearing. As the Martin case from the
3 Eighth Circuit establishes, adequate protection is a
4 question of fact. You cannot have a court decide
5 adequate protection without a hearing, an
6 evidentiary hearing.

7 THE COURT: Thank you.

8 MR. BRUNSTAD: Thank you.

9 MS. SOOKNANAN: Good morning, your
10 Honors. Sparkle Sooknanan for the Altair
11 appellants, holders of bonds issued by the Employees
12 Retirement System. May I reserve two minutes for
13 rebuttal?

14 THE COURT: Yes.

15 MS. SOOKNANAN: Thank you. Your
16 Honors, it is undisputed that since July of 2016,
17 the ERS has received over \$100 million of employer
18 contributions that it has diverted from Appellants's
19 collateral accounts. It is also undisputed that
20 appellants have a lien on that property and all
21 employer contributions received by the ERS. And in
22 the absence of adequate protection to protect that
23 property interest, Appellants are entitled to relief
24 from the PROMESA state.

25 Appellants are both statutorily and

1 constitutionally entitled to adequate protection.
2 What the adequate protection requirement does is it
3 essentially reconciles the competing interests of
4 debtors and creditors. Debtors get some breathing
5 room, secured creditors are barred from seizing
6 their property during the stay, and in exchange the
7 adequate protection requirement is meant to protect
8 secured creditors from the loss of value of their
9 collateral. And what the Commonwealth is advocating
10 is essentially a one-sided automatic stay where
11 debtors's interests are protected and secured
12 creditors's rights are essentially disregarded, and
13 that is not the statute that Congress enacted.

14 THE COURT: I understand that it's
15 (indecipherable) that the collateral potentially has
16 been reduced here, but let me ask you the same
17 question I was previously asking.

18 Is there a claim here in this case
19 that the reduction in collateral is enough to push
20 you to the point where there's no equity cushion, or
21 even worse, such that the payment of the debt itself
22 is now in jeopardy? Because as I understand it,
23 you've I think stipulated that there'll payments
24 through the current extension of the Moratorium Act
25 and then inflows thereafter will be roughly 19

1 million a year where the debt obligations are
2 roughly 14 million a year -- or a month, rather. So
3 it sounds like in 20 months, you build up 100
4 million back up.

5 So I'm having trouble seeing where
6 you've alleged the type of impairment of collateral
7 that would rise to the level of inadequate
8 protection.

9 MS. SOOKNANAN: So two responses to
10 that, your Honor. First, if it is in fact true that
11 all future employer contributions are going to be
12 paid, the bonds may well be over-secured. The
13 problem is here that Appellees themselves have said
14 very clearly that future employer contributions are
15 uncertain. And in fact, the only facts in the
16 record below, on which the District Court made its
17 decision about the certainty of future employer
18 contributions, is that they're uncertain.

19 The ERS has said that in plain terms,
20 the Commonwealth just a couple months ago, in
21 October when it submitted its fiscal plan to the
22 Oversight Board said that, that we can't trust in
23 those future employer contributions. So they cannot
24 then say we are protected by those very
25 contributions.

1 And the District Court -- remember, a
2 district court found that the reason we are
3 adequately protected is because there is this future
4 revenue stream. And the only facts in the record
5 about that revenue stream were facts we put forward,
6 statements by Appellees themselves that those
7 payments are not uncertain -- are uncertain. I
8 apologize. And if those payments are uncertain the
9 bonds are not over-secured.

10 And the second response to that is, is
11 the burden of Appellees to show that in fact
12 they're -- the bonds are over-secured? They have
13 not, to this point, and perhaps they will clarify if
14 it is their position that the bonds are over-secured
15 and if they would like to prove as an evidentiary
16 matter that that is the case, but they did not meet
17 that showing below and there's no record on which
18 this Court to make that showing. And the District
19 Court didn't find that to be the case.

20 THE COURT: Could you clear up a
21 little confusion regarding -- as I understand it,
22 there's 75 million in funds that are in bank X, that
23 you would be all fine, everything would be okay if
24 it were moved over to a trust account?

25 MS. SOOKNANAN: Yes, your Honor. So

1 it is our -- so they have diverted -- as of Nov --
2 as of the time of the hearing, as of November it was
3 around 75 million. The ERS has said it's receiving
4 approximately 18.8 million a month and so there's
5 somewhere more than 100 million now.

6 What they are saying is that they're
7 diverting our money, but they don't actually need
8 it. They're not using it. The ERS has represented
9 to this Court that it's simply sitting in an account
10 being held and not used.

11 THE COURT: And does your lien not
12 trade -- follow those funds into that account?

13 MS. SOOKNANAN: Correct, it does not.
14 And what we've said to them is, "If you're not using
15 the money, instead of holding the money in an
16 operation account where you're free to spend it
17 tomorrow, simply place it in a separate account,
18 attach a lien, or hold the money for our benefit
19 until a court decides who has the right to that
20 money." That's all we have asked for and that would
21 have ended this litigation. That's what we asked
22 for in the District Court.

23 THE COURT: And do you agree with --
24 ERS asserts that its prohibited from making that
25 transfer by the Moratorium Act, or executive order

1 issue pursuant to the Act, and what they cite in
2 their brief simply suspends an obligation to make
3 the transfer, but at least English translation does
4 not indicate that it prohibits them from making a
5 transfer.

6 MS. SOOKNANAN: So, even if the -- the
7 Moratorium Act prohibits them from making that
8 transfer, that is why we are saying "Even if you're
9 not transferring it to our collateral accounts, if
10 you're not using it put it in a separate account,
11 don't keep it in an operating account where you're
12 free to spend it. Put it in a separate account and
13 agree not to touch the money for this stay and when
14 a court decides whether we have actual access to the
15 money or not, that's when the money can be moved."

16 So we understand that the -- their
17 hands might be tied by the Moratorium Act in some
18 respect, but if they're not using the money and they
19 have no need for the money they should separate the
20 money, and that's all we have asked and they have
21 refused to do so to this point.

22 THE COURT: And so, do you agree that
23 the Moratorium Act not only suspends an obligation,
24 but prohibits them from performing that obligation?

25 MS. SOOKNANAN: Your Honor, I would

1 say the Moratorium Act suspends the obligation even
2 if it -- even if it prohibits them that does not
3 prevent them from simply separating the money.
4 Right now the money is sitting in an operating
5 account and they are representing to this Court
6 they're not using it, but they're free tomorrow to
7 spend that money.

8 Our lien does not attach to that
9 operating account and they have stipulated that they
10 pay expenses out of that operating account.

11 At the end of the day, Appellants are
12 entitled to adequate protection, and in this case,
13 they have not proven that we are adequately
14 protected by that future lien on employer
15 contributions. And this is not a case where
16 Appellants are saying despite -- there's a lot of
17 rhetoric in the Commonwealth's brief about the
18 financial woes facing the Commonwealth, and that may
19 well be true, but this is not a case where the
20 Commonwealth is saying to this Court that it needs
21 Appellants's property to keep the lights on. They
22 are saying to this Court that they are diverting our
23 property, money that is ours, and it is undisputed
24 that it is ours, they are diverting that money, just
25 keeping it in an account for no reason whatsoever

1 and holding that money. We cannot start telling
2 secured creditors that they will have no access to
3 their collateral. That it will be diverted by a
4 debtor with no adequate protection whatsoever, and
5 in this case, for no reason whatsoever.

6 Secured creditors are constitutionally
7 entitled to adequate protection.

8 THE COURT: In your case, do you think
9 it makes any difference -- suppose we agree with you
10 about the standard --

11 MS. SOOKNANAN: Yes.

12 THE COURT: -- that adequate
13 protection -- is the Bankruptcy Code adequate
14 protection and we look to see whether there's an
15 equity cushion of at least 20 percent or more or
16 something like that. Does it make any difference in
17 your case to whom the burden of production and the
18 burden of persuasion is allocated?

19 MS. SOOKNANAN: Your Honor, in this
20 case it does, because the appellees below had the
21 burden of proving that we are adequately protected.
22 They have not contested that and the District Court
23 held that to be so. They did not meet that burden
24 below. They did not even attempt to show that there
25 was an equity cushion because no hearing was

1 conducted. And for that reason, at a minimum, if it
2 is their claim today that we are adequately
3 protected because there is an equity cushion, and
4 this Court could reman the case so they have the
5 opportunity to prove that. But on the record that's
6 before this Court, there is nothing that this Court
7 can use to decide that there is an equity cushion,
8 all that's in the record about that future revenue
9 stream are statements from Appellees themselves that
10 those payments are uncertain.

11 And on that record, the Court cannot
12 find and the District Court incorrectly found that
13 Appellants are adequately protected. Thank you,
14 your Honors.

15 MS. MURPHY: Good morning, your
16 Honors, and may it please the Court, Erin Murphy on
17 behalf of the individual Commonwealth Defendants.

18 Congress enacted Section 405 of
19 PROMESA for the expressly enumerated purpose of
20 providing the Commonwealth with immediate but
21 temporary reprieve from costly creditor lawsuits.

22 Now notwithstanding Congress's findings that this
23 temporary stay is essential to stabilize the region,
24 Appellants insist that they should be able to
25 litigate their claims immediately even though they

1 concededly are being paid in full right now, and
2 concededly will continue to be paid in full
3 throughout the duration of PROMESA's stay.

4 The District Court's conclusion that
5 they should have to wait out the remainder of the
6 brief stay that's left is a classic interlocutory
7 order over which we believe this Court lacks
8 jurisdiction, but in the event the Court concludes
9 otherwise, should affirm the decision below because
10 the District Court was manifestly correct in
11 concluding that Appellants failed to demonstrate
12 anything that differentiates them from all the other
13 creditors to whom this stay is plainly intended to
14 apply.

15 THE COURT: Let's assume that that
16 shows that the debt payments were remaining current
17 for now, but the Commonwealth took all of the
18 collateral that would secure future debt payments, a
19 hundred percent of it, is it your contention that as
20 the Commonwealth is in the process of doing that,
21 Congress prohibited the creditor from going to court
22 to protect itself?

23 MS. MURPHY: Well, the creditor can go
24 to court and try to demonstrate cause to lift the
25 stay, and that's going to depend on the particular

1 facts that --

2 THE COURT: Are you saying that
3 (inaudible) cause, what I just described?

4 MS. MURPHY: I think it depends on
5 what the collateral is.

6 THE COURT: Assume it's a hundred
7 percent of the collateral.

8 MS. MURPHY: But if the collateral is
9 purely cash, at the end of the stay they get to
10 litigate their claims and seek money damages for the
11 full amount of what they lost during the stay.

12 THE COURT: Well, if the money is
13 being given and dispersed to a million people, so
14 there's no claim, and they have given unsecured
15 claim for money damages against the Commonwealth,
16 the whole idea of security seems to me that
17 (indecipherable) standards of secured credit rather
18 than unsecured.

19 MS. MURPHY: Sure. And these
20 creditors will be secured creditors. They are right
21 now and they'll be secured creditors when the stay
22 lifts.

23 THE COURT: Not in the hypothetical
24 I've asked you to address, which as I've proposed in
25 the hypothetical that all of the collateral is

1 taken.

2 MS. MURPHY: Right. And in that
3 circumstance, you'd be a secured credit -- secured
4 creditor whose security is gone, but you'd have a
5 claim to litigate against the Commonwealth saying
6 "You dissipated my security and therefore you owe me
7 money damages for the full value of my claim."
8 That's what differentiates what's going on here from
9 a bankruptcy case.

10 THE COURT: So I think what you're
11 saying is tomorrow the Commonwealth could go out and
12 take all of the collateral, essentially, of all of
13 the creditors in Puerto Rico and there's nothing
14 that the creditors can do about it until after the
15 fact bring damage claims that themselves would be
16 unsecured. That's what I'm hearing you saying.

17 MS. MURPHY: What I'm saying is that a
18 creditor would need to come in and make a showing
19 about not just that their collateral is being taken
20 right now, but that they won't be able to recover
21 their collateral once the stay lifts. And that's
22 what these creditors can't show.

23 THE COURT: True. In the hypothetical
24 it's being dispersed to the general population.

25 MS. MURPHY: And if they could

1 demonstrate that not only is all of their collateral
2 being dissipated, but there will be nothing left at
3 the end of the day, there will be no ability for
4 them to get money damages to get back the money they
5 have lost, that might be an instance where you could
6 demonstrate cause to lift the stay.

7 But that's not what we have here.

8 What we have here is a creditor who's being paid
9 right now, and who hasn't demonstrated that they
10 won't be paid once this stay lifts or that even if
11 they weren't paid at some point, they wouldn't have
12 all the remedies that both PROMESA and Act 21, the
13 Moratorium Act, contemplate. Because both of those
14 statutes fully preserve their secured interests and
15 their ability to litigate those secured interests
16 once the stay lifts.

17 THE COURT: Are you aware of any
18 bankruptcy case that holds that the elimination of
19 collateral is not something that is cause for relief
20 merely because you would have an unsecured damage
21 claim in which you might or might not recover your
22 money?

23 MS. MURPHY: In bankruptcy context,
24 we're operating under a rule that we don't think is
25 the right rule here. In the bankruptcy context,

1 there is an adequate protection standard written
2 into 362. There's also a burden shifting
3 (indecipherable) written into 362 that says it's the
4 debtor's burden to demonstrate adequate protection.
5 Both of those provisions were conspicuously excluded
6 from Section 405 for PROMESA.

7 It does not include an adequate
8 protection standard and it does not -- you know,
9 they have repeatedly said that it's our burden.
10 Under 362 it's the debtor's burden, but that's
11 because the statute expressly says that it's the
12 debtor's burden to demonstrate adequate protection.

13 That is another provision that
14 Congress did not import into Section 405. And we
15 would submit the reason Congress didn't import a
16 burden shifting regime for proving adequate
17 protection is because Congress also did not import
18 an adequate protection standard into Section 405 of
19 PROMESA. It didn't intend that standard to apply
20 and that's because you don't need an adequate
21 protection standard in this context because PROMESA
22 is quite different from the bankruptcy stay.

23 A bankruptcy stay operates for the
24 duration of the entire bankruptcy. So in effect
25 what it says is you're never going to get to

1 effectively foreclose on your collateral, that's
2 what's usually going on in an inadequate protection
3 case, they want to foreclose on the collateral. And
4 the automatic stay in bankruptcy says you don't get
5 to do that period, we're letting the debtor keep
6 your collateral for the duration of the stay. That,
7 as courts have recognized, raises some distinct
8 Fifth Amendment concerns that have led to an
9 adequate protection standard that Congress put into
10 that provision.

11 Here, that's not what's going on.
12 PROMESA doesn't say that the debt that -- for one
13 thing, there is no debtor right now. There is no
14 Title III bankruptcy proceeding here. The
15 Commonwealth is not a debtor. All that's going on
16 is there's essentially a stay put in place for
17 everyone to figure out whether we're going to
18 proceed to a Title III bankruptcy proceeding,
19 whether we're going to have voluntary restructuring,
20 whether some of these obligations may continue to
21 remain in force in the same shape that they are
22 right now.

23 So this is very different from
24 anything you have in the bankruptcy context and it's
25 also temporary, it ends February 15th or at the very

1 latest May 1st. And at that point, either the
2 Appellants here will be able to litigate their
3 claims in full and seek money damages for whatever
4 injuries they believe they have suffered, or we will
5 be in a Title III proceeding at which point the 362
6 stay will kick in. Because in Title III, unlike in
7 Section 405 of PROMESA, Congress actually imported
8 362 in its entirety.

9 So if we get into a Title III
10 bankruptcy proceeding, they'll have a different set
11 of arguments that they can make, they'll be able to
12 say that they're entitled to adequate protection and
13 that we need to make a showing about what is --

14 THE COURT: That's closing -- that's
15 closing the barn door, right? A little too late
16 here if in seven months all of the collateral has
17 been taken. I keep going back to it and (inaudible)
18 the burden, because I don't think the burden is
19 constitutionally imposed, so we have a statutory
20 instruction.

21 But I'm just having great difficulty
22 with your argument that there's this seven-month
23 window where the government can entirely, entirely
24 destroy the value of collateral a hundred percent
25 and yet that wouldn't in and of itself be good

1 cause.

2 Now, I'm not saying they're entirely
3 destroying it here. There may be in the future
4 income streams as the court found enough, but you're
5 asking us to take pretty broad proposition that
6 seems to run into a real takings problem.

7 MS. MURPHY: Well, your Honor does not
8 have to resolve the hypothetical that you suggested
9 in order to resolve this case, because as you've
10 recognized, that's not the claim here.

11 THE COURT: Right, if you reject that
12 hypothetical then it turns the argument back to
13 whether there is adequate protection here or perhaps
14 whether the burden of raising a question of adequate
15 protection was or was not met in the allegations
16 made, which is a different conversation than you've
17 been urging us to have so far.

18 MS. MURPHY: Sure. And we do think
19 that the right way for the Court to look at this is
20 not -- and I don't think it would be consistent with
21 what Connis (ph) was trying to do in PROMESA to say
22 that the Commonwealth has to go through elaborate
23 hearings where it demonstrates exactly, you know,
24 for every dollar that we're spending to try to
25 ensure that residents are receiving essential

1 services, which Congress put express findings into
2 this statute that part of the point of the stay was
3 to give the Commonwealth the resources it needed to
4 ensure that its residents will receive essential
5 services. So the idea that, you know, for every
6 dollar diverted the Commonwealth has to demonstrate
7 that it's also setting aside the exact equivalent
8 dollar to ensure --

9 THE COURT: That's not the adequate
10 protection test. You just have to show -- someone
11 has to address the issue of whether there's an
12 equity cushion or not. And if they're over-secured,
13 then they're over-secured and go at it.

14 MS. MURPHY: Absolutely, your Honor,
15 which is why we don't believe that they could
16 satisfy adequate protection even if that were the
17 correct standard here. But, we do believe that the
18 right standard for the Court to apply is a more
19 traditional equitable balancing of the equities in
20 the case, looking at not just whether they're
21 suffering some sort of harm as a result of the
22 Commonwealth's actions, but whether they are
23 suffering irreparable harm that cannot be remedied
24 at the end of the stay.

25 And I think that has to be the right

1 standard, because we're talking about a statute that
2 was enacted on the express premise that the
3 Commonwealth was using pledged revenues to pay for
4 essential services. And the executive orders they
5 want to challenge, the first one, Executive Order
6 18, allowing the diversion of Toll Revenues, that
7 was promulgated more than a month before PROMESA was
8 enacted.

9 And there were -- it's also implicit
10 and explicit in PROMESA that there would be
11 creditors who wouldn't be paid during the duration
12 of this stay.

13 So Congress enacted this statute,
14 understanding that there were creditors as to who
15 the Commonwealth and its instrumentalities wouldn't
16 live up to a hundred percent of the bargain that
17 they had made during this stay.

18 THE COURT: Wait. How do you suggest
19 we deal with Section 405(k)?

20 MS. MURPHY: I think section 405(k) as
21 a form of -- an additional form of protection for
22 Appellants's interests.

23 THE COURT: But doesn't it suggest
24 that we should not interpret PROMESA in a way as to
25 destroy security interests since Congress said

1 PROMESA wasn't to destroy security interests?

2 MS. MURPHY: No, I think that what
3 405(k) is saying is notwithstanding the fact that
4 the Commonwealth didn't have to live up to its
5 obligations during the stay, that doesn't mean that
6 you don't have all your rights the moment the stay
7 lifts. So it's a form of protection saying, you
8 know, unlike in a bankruptcy proceeding, we're not
9 actually allowing the Commonwealth to discharge or
10 alter your means, your secured interests, your
11 contractual rights. All of those are fully intact
12 and the moment the stay expires you can go to court
13 and allege and try to prove that, you know, that
14 these actions that were taken were inconsistent,
15 that they caused you harm, that you're entitled to
16 damages. So I actually think that 405(k) is further
17 proof that Congress intended to allow the
18 Commonwealth to do the things that it knew the
19 Commonwealth was doing when it enacted this statute,
20 and instead of creating a broad outlet to basically
21 let every creditor out from under the stay, Congress
22 said what we're going to do is ensure that your
23 rights are fully protected once the stay lifts. And
24 the "For clause" standard is really intended to be a
25 safety valve to deal with the extraordinary

1 creditor, not the creditor who's just making
2 basically the same argument that any creditor, at
3 least any secured creditor could make, which is, you
4 know, "I don't think the Commonwealth is living up
5 to a hundred percent of --"

6 THE COURT: Tell me what -- what an
7 extraordinary creditor would be, in your mind.

8 MS. MURPHY: I think an extraordinary
9 creditor, you know, one, you might have a creditor
10 who has a form of collateral that actually cannot be
11 remedied if it's lost during the -- it's something
12 other than money. Money can always be remedied with
13 money. If they had a particular form of collateral,
14 that was being, you know, diminished and could not
15 be made up for after the stay was lifted.

16 You might also perhaps have a creditor
17 who has unique circumstances of their own that make
18 it irreparable damage if they aren't getting paid
19 now. Now of course, I do think that you at least
20 have to be a creditor who's not getting paid, which
21 these creditors aren't. These creditors are being
22 paid in full and conceivably will be paid in full.

23 So, in -- in our mind, you know, that
24 makes them basically the very last creditors that
25 Congress would have wanted to be able to lift the

1 stay and engage in litigation about whether they
2 should be entitled to effectively two lines of
3 security for their interest instead of just one.

4 THE COURT: When you say that the
5 statute should -- or contemplates sort of a
6 traditional balancing of the equities, so shouldn't
7 there be a hearing?

8 MS. MURPHY: I think that the -- the
9 way that this case ended up getting to the Court
10 -- I mean, there were stipulated facts that
11 basically stipulated to all of the facts that were
12 relevant to the analysis here, because they
13 stipulated that they've been paid, they will be paid
14 throughout the stay and there was stipulations about
15 what the revenue streams -- I mean, in the Altair
16 case there's specifically the stipulations Judge
17 Kayatta referenced about exactly what the levels of
18 the revenue streams are. So everything was there
19 that the Court needed.

20 And in the Peaje case, there had just
21 been a hearing from which hundreds of pages of
22 testimony were designated on the specific question
23 of whether the HTA revenues were going to be
24 sufficient in the future. And one of the claimants
25 there was an insurer saying "We think we're going to

1 have to cover claims in the future because we think
2 these revenues will run out."

3 So, you know, it's not as if the
4 District Court made a decision here without facts.
5 And in that particular context, I think really it
6 was incumbent on these parties if they thought
7 given -- you know, given the record that they put
8 before the Court of stipulated facts, of testimony,
9 of the information that the Court recently could
10 have viewed as sufficient for it to make its ruling,
11 I do think it was incumbent on them to say "Hey,
12 hold on, you know, you need to reconsider this
13 ruling because we think we had something additional
14 beyond what we already put before you that you
15 didn't realize would have been relevant." And
16 neither of the appellants here did that.

17 THE COURT: What is the result of this
18 ongoing litigation had on the whole notion of
19 breathing room?

20 MS. MURPHY: Well, there is a lot of
21 testimony that the Commonwealth put on about that in
22 the Brigade hearing, and some of that was designated
23 in the Peaje proceedings, regarding about how, you
24 know, it has caused the Commonwealth to have to
25 divert resources. And having a hearing not only

1 requires someone to come testify, it requires
2 pulling people away from what they should be doing
3 under PROMESA, which is, you know, getting the
4 Commonwealth back in fiscal order to prepare for the
5 hearing, to help prepare and review all papers that
6 are being filed in all of this litigation.

7 So it really has been a tremendous
8 distraction to the Commonwealth, which is exactly
9 the opposite of what Congress intended when it said
10 "We're going to give you this stay precisely because
11 we don't want you to be spending your time in costly
12 creditor litigation when it would be better to put
13 that time to the use of -- and seeing to the needs
14 of the people of Puerto Rico and getting Puerto Rico
15 back into fiscal order."

16 THE COURT: And just one more
17 question.

18 Regardless of who has the burden, if
19 we're honing in on the notion of equitable cushion,
20 what specifically in the evidence demonstrates that
21 there's an equitable cushion, the record stipulated
22 record evidence?

23 MS. MURPHY: Sure. I think it's --
24 it's -- I mean, the stipulated evidence in Altair
25 demonstrates that even without the contributions

1 from the Commonwealth employees, which are only
2 suspended temporarily pursuant to these executive
3 orders, even the non-Commonwealth contributions are
4 higher than the stipulated amounts necessary to
5 service the debt.

6 And as to the HTA Peaje party, you
7 know, I don't understand them to ever have even
8 suggested that they think the HTA revenues are going
9 to be so low that they can't be paid, particularly
10 given that Peaje is actually -- they're kind of the
11 first priority set of creditors under the HTA,
12 because they're the earliest set of bonds. So
13 basically you'd have to have like no HTA revenues
14 coming in for them to have any real risk of not
15 getting paid. And that's why, as I understand it,
16 really their complaint has only been they don't
17 think there will be sufficient revenue to not only
18 pay them, but reinstate the reserve accounts and we
19 don't think that's the right standard even -- you
20 know, we don't think they're entitled to an equity
21 cushion that would not only ensure that they're
22 being paid, but also kind of ensure that they have a
23 secondary line of, you know, kind of security for
24 getting paid in the future. If there are no further
25 questions, thank you.

1 MR. CHESLEY: May it please the Court,
2 Richard Chesley on behalf of ERS, the Employee
3 Retirement System of the Commonwealth of Puerto
4 Rico.

5 I appreciate the Court's time here
6 this morning and I will be brief as Counsel for the
7 Commonwealth has covered many of the topics we
8 wanted to raise. But with respect to the issues
9 before this Court and regardless of how the Court
10 resolves certain of the legal challenges, the
11 Appellants's appeal with respect to ERS founders on
12 one crucial set of facts to which they stipulated
13 below, and which the District Court relied upon in
14 its holding. That there are sufficient monies in
15 the debt service and reserve accounts to service the
16 bold holder debt until April 1st of 2017, after the
17 PROMESA stay expires. And not a single principal
18 and interest payment will be missed while the
19 PROMESA stay remains in place and therefore, the
20 Appellants face no financial harm as a result of the
21 stay.

22 Moreover, based upon the liens that
23 are held in the pledged property, and we'll talk
24 about that in a moment, the bondholders are secured
25 not only until the conclusion of the PROMESA stay,

1 but for many, many years to come based upon the
2 stipulated record that was before the District
3 Court.

4 And again, while Counsel for the
5 Commonwealth has adequately covered many of the
6 issues we want to touch, I do want to raise a couple
7 of points that I think are extremely relevant for
8 this panel's consideration.

9 First of all, the Appellants take the
10 position that the standards for relief from the
11 automatic stay under Article IV of PROMESA, I'm only
12 talking about Article IV of PROMESA, should simply
13 mirror those under Section 362 of the bankruptcy
14 code. Namely the cause for relief from the
15 automatic stay should include, but not be limited
16 to, which the bankruptcy code provides, adequate
17 protection. They advanced the position despite the
18 fact these two statutory schemes have different
19 language and were intended for very different
20 purposes.

21 So then what did Congress intend? And
22 I think the Congressional history underlying Article
23 IV of PROMESA is very critical to see what did
24 Congress intend. Well, the house report on Section
25 405, which is cited in our brief, states under the

1 Section 405 automatic stay appoint enactment, "If a
2 party is determined to be subject to irreparable
3 damage because of the imposition of the stay the
4 district court is authorized to grant relief from
5 the stay to such party."

6 Of course, if Congress wanted to
7 impute the adequate protection standards under
8 Section 362 and Section 361 into Article IV it
9 certainly could have and it absolutely did that with
10 respect to Article III of PROMESA. But we're not in
11 the realm of Article III, we're simply during this
12 limited phase of the infirm relief.

13 THE COURT: And then how do you
14 address the argument that as a constitutional
15 matter, taking so much of the collateral as to
16 impair the ability to pay the debt is itself
17 irreparable harm because it's a taking?

18 MR. CHESLEY: And this goes to the
19 factual issues that were before the District Court
20 on the ERS appeal.

21 THE COURT: Well, no, putting aside
22 the facts, you are suggesting the use of the
23 irreparable harm standard rather than an inadequate
24 protection standard.

25 MR. CHESLEY: Yes, your Honor.

1 THE COURT: And I'm having trouble
2 seeing what the difficulty is if we had a true
3 scenario assuming the facts did show blatant lack of
4 adequate protection, wouldn't that be irreparable
5 harm?

6 MR. CHESLEY: Well, fortunately in our
7 case that's not the factual record, but to the
8 extent -- you Honor, I do agree to the extent we had
9 a situation where there was a blatant taking of all
10 of the property, then I think there would be a
11 compelling argument that that is irreparable harm.

12 THE COURT: And then could you also
13 address the issue I had asked Counsel about earlier,
14 why -- what is it that actually prohibits ERS from
15 making the payments? I understand there's
16 legislation that has suspended your obligation to do
17 so.

18 MR. CHESLEY: The Moratorium Act
19 prohibits the transfer of that --

20 THE COURT: And what is it in -- can
21 you refer to us any language in that --

22 MR. CHESLEY: With respect to the
23 Moratorium Act, your Honor, I can reference that to
24 the Court, but it limits the ability -- limits the
25 inflow of contributions from the Commonwealth to

1 ERS, not the non-Commonwealth employees, and it
2 limits our -- precludes our ability to then transfer
3 amounts that we are holding to the bondholder.

4 THE COURT: Okay. The cites in the
5 briefs didn't seem to help on finding language that
6 did that.

7 MR. CHESLEY: We apologize for that,
8 your Honor. We can file a supplement to the extent
9 that is necessary.

10 But I do want to touch in my last
11 minutes on the facts. Yes, your Honor?

12 THE COURT: Please file that.

13 MR. CHESLEY: We will, your Honor.
14 And if I can, I do want to touch on the facts of our
15 case. Specifically since July of 2016, at the
16 beginning of the PROMESA stay, the ERS -- ERS has
17 been holding over 75 -- currently holding over 75
18 million in the operating account based upon
19 contributions from the non-Commonwealth employers.

20 Counsel for the Appellants made
21 mention of the fact that there's all these
22 representations or statements as to the uncertainty
23 with respect to future contributions. There is no
24 uncertainty with respect to the non-Commonwealth
25 contributions which amount to approximately

1 \$20 million per month. In fact, during 2015, again,
2 this is in the record, ERS received about
3 \$224 million. It solely in non- -- non-Commonwealth
4 employer contributions. This is in the face of a
5 debt service obligation of \$166 million.

6 This undisputed evidence was presented
7 before the District Court, that in fact the equity
8 cushion exists. And with respect to that
9 \$20 million, it continues to flow in and the
10 Appellants do have the lien. If you look at the
11 pledged property definition that's included in the
12 stipulated facts, they have a lien in that
13 collateral, they have a lien in the reserve account
14 collateral which will pay them, and they have a lien
15 in the future revenue.

16 And the last thing that I think is
17 critical is what the judge did with respect to -- if
18 I may finish, your Honor.

19 THE COURT: Yes.

20 MR. CHESLEY: What the judge did, the
21 District Court with respect to the balancing of the
22 equities, and he made particular mention of the fact
23 that once the stay is alleviated the future revenue
24 stream, which is an additional \$250 million,
25 approximately, per year in Commonwealth employer

1 contributions, will then be made available back to
2 ERS. This, in combination with more than adequate
3 amounts to pay the debt service based upon the
4 non-Commonwealth gave the District Court more than
5 adequate factual support to grant the relief that he
6 did. Thank you, your Honor.

7 MR. LUSKIN: May it please the Court,
8 Michael Luskin for the Financial Oversight and
9 Management Board of Puerto Rico, the Appellant in
10 seven appeals involving the intervention motions and
11 the amicus in the two lift-stay appeals that we've
12 been hearing about this morning.

13 THE COURT: Mr. Luskin, are there any
14 pending cases in the District Court in which you're
15 waiting to hear about your intervention status?

16 MR. LUSKIN: Yes.

17 THE COURT: Okay.

18 MR. LUSKIN: One called Lex (ph)
19 claims, which is mentioned in our opening brief or
20 amicus -- or opening appeal brief.

21 I know time is limited, but I am going
22 to spend a moment on the seven appeals that are
23 consolidated here. We believe that the District
24 Court improperly applied a narrow and mechanical
25 test of Rule 24, governing intervention, the result

1 of course was to deny us participation in the seven
2 cases and the order should be reversed. The
3 District Court found what it referred to as a
4 procedural deficiency, but there was none, the Court
5 apparently believed that what the board was required
6 to do was to file one of the pleadings of the kind
7 listed in Rule 7, answer and answer with
8 counterclaims and so on, but that's wrong.

9 What the rule requires is a pleading
10 that sets out the claim or defense for which
11 intervention is sought and that is precisely what we
12 did.

13 We believe the District Court should
14 have taken note of the -- and taken into account the
15 specific procedural postures of the cases. In the
16 three consolidated Peaje cases there were no
17 complaints on file. Two of the three parties had
18 included proposed complaints with their motion
19 papers and one of them, Altair, did not include a
20 proposed or draft complaint. So, there was nothing
21 to respond to in the traditional Rule 7 sense.

22 THE COURT: In some of the cases where
23 there was a complaint filed --

24 MR. LUSKIN: Yes, the Brigade cases.

25 THE COURT: -- why didn't the Board

1 just file, I mean it could have been a one-page
2 answer, right, because an answer -- you only need to
3 respond to allegations against you. There were
4 none.

5 MR. LUSKIN: Well, I think that -- you
6 know, we did struggle with that, your Honor, to tell
7 you the truth. We did feel that, frankly,
8 responsibly to reply to those, to answer those
9 allegations we would have had to take a position on
10 the merits on the preemption, the taking and the
11 other constitutional claims.

12 THE COURT: Why is that? Under Rule
13 (indecipherable) you don't have to respond to
14 allegations that aren't against you, right?

15 MR. LUSKIN: Well, I can -- you're
16 correct and I will --

17 THE COURT: But that was your
18 thinking, you thought you might be taking a risk of
19 having to respond?

20 MR. LUSKIN: Well, we were -- yes, we
21 did not want to take a position, frankly, on any
22 aspect of these constitutional claims, and that
23 relates to the stay issue as well. Having the
24 Oversight Board take a position on the merits, or
25 refusing to take a position on the merits, has an

1 impact on our ability to negotiate. Our goal as we
2 see, our statutory rule is to operate in a level
3 playing field, frankly, a quiet playing field.
4 That's what the stay is about, and that's what we
5 said in our intervention papers, and that's what we
6 explained to Judge Besosa as to why in our -- in our
7 motion for reconsideration, why we didn't take
8 positions on the merits. We still have not taken
9 positions on the merits and we believe that during
10 this quiet period before Title VI or Title III
11 proceedings are filed we should not.

12 Our goal is to deal with those claims
13 in the conference room, not the courtroom, and see
14 if we can negotiate restructuring agreements or
15 consensual fiscal plans.

16 What we did do, in all seven cases,
17 Judge Kayatta, is -- is to address the sole live
18 issue that was then before the Court, which were the
19 pending motions to lift the stay. And there can be
20 no doubt about what our position was, and that is
21 after all the goal of Rule 24.

22 We think the District Court should
23 have addressed our motions on the merits, not
24 relying on the procedural efficiency, to use his
25 words. And had he done so he would have referred to

1 Section 212(a) of PROMESA which allows us to
2 intervene in any action against the Commonwealth.
3 He could have done so under Rule 24a-2, which allows
4 us to intervene as of right based on our interest,
5 our unique position, the adequacy of representation
6 sensation and so on. And we would then have
7 participated in the case below.

8 We think that the -- this Court's
9 prior decisions support the Oversight Board's view
10 on these motions. The one case cited in the Court
11 below was a case where there was no -- no proposed
12 pleading at all submitted and we would agree,
13 if -- if the punitive intervenor doesn't bother to
14 put in a proposed pleading of any kind then I could
15 see denying the motion. But even there in the
16 Court's decision in Liggett (ph), there was no
17 intervention motion, but intervention was allowed,
18 particular facts but the right decision clearly. So
19 those seven orders should be reversed.

20 Unless the Court has questions on
21 intervention I'd like to turn to the merits. The
22 amicus position on the lift-stay motions. And we
23 have suggested, the Oversight Board has suggested a
24 standard that is somewhat different than the other
25 parties, we do not believe that the sole touchstone

1 should be adequate protection, though I will say,
2 Judge Kayatta, that your hypothetical would, I
3 believe, present a situation where adequate
4 protection might trump everything else. But this is
5 nowhere close to a case where a hundred percent of
6 anyone's collateral is being taken and destroyed.

7 We also don't believe that irreparable
8 injury alone is the sole touchstone. And others
9 have pointed out that Bankruptcy Code 362 includes
10 adequate protection as reason, as cause for lifting
11 the stay. Certainly Congress knew what it was doing
12 when it drafted 405E, it did not copy that language
13 notwithstanding the fact that it -- it copied or
14 incorporated verbatim 98 other provisions of the
15 bankruptcy code in Section 301 of PROMESA. When it
16 wanted to copy it knew how to copy. And it did not
17 do so here and I think that for purposes of
18 statutory construction that ought to be enough.

19 So why should the PROMESA standard be
20 a different standard? And my answer is that PROMESA
21 establishes a very different regime than the
22 bankruptcy code. PROMESA establishes what I refer
23 to as a quiet time, the breathing room, which is
24 actually part of the findings in the statute itself,
25 and purposes in the statute itself. It establishes

1 breathing room, a quiet time for the Oversight Board
2 to do the very tasks that its mandated to do by the
3 statute, which is to organize, to collect
4 information, to designate covered instrumentalities
5 to develop projections to review budgets. To
6 develop fiscal plans and to negotiate out-of-court
7 restructuring agreements, and to assess the
8 advisability of going the out-of-court route or the
9 consensual route of Title 6 of PROMESA or the
10 nonconsensual or only partially consensual route of
11 Title III bankruptcy. And it's supposed to do -- we
12 are charged with doing all of that during the quiet
13 period.

14 Only after we decide which way to go
15 do we commence a bankruptcy proceeding if that's the
16 decision, to go into chapter -- a Title III and in
17 Title III-362 of the bankruptcy code along with 97
18 other provisions, expressly govern verbatim. But
19 that's not where we are, we're in Title IV in the
20 quiet period. And it is very important.

21 Forcing decisions on constitutional
22 issues to go to the intervention point would impede
23 negotiations, if not render them outright
24 impossible.

25 THE COURT: In Congress --

1 MR. LUSKIN: Yes?

2 THE COURT: And I realize it was quite
3 a concession because you used the word "Might", but
4 you're attempting that a complete elimination of the
5 collateral might be enough to outweigh everything
6 else. Stay with that for a second --

7 MR. LUSKIN: Yes.

8 THE COURT: -- and not treat it as a
9 concession, but treat it as a talking point. Why
10 wouldn't Congress have wanted to say "Well, that's
11 enough, but if you just take half the collateral,
12 well below the equity position, that's not enough"?
13 It's -- it's a -- it's a taking just as much.

14 MR. LUSKIN: Well, but for adequate
15 protection and constitutional purposes, the only
16 taking that matters is a taking that threatens the
17 secured creditors's interest in the debtor's
18 interest in the collateral.

19 THE COURT: Yeah, so assume that's the
20 rule.

21 MR. LUSKIN: So if that's --

22 THE COURT: In any equity position
23 debtor is out of luck -- creditor is out of luck,
24 okay.

25 MR. LUSKIN: Right.

1 THE COURT: But I'm talking about a
2 scenario where you go well below the equity --

3 MR. LUSKIN: Right. And I -- and I
4 believe that in a situation where the facts show
5 that a secured creditor at the outset of a case is
6 clearly and unequivocally moving from over-secured
7 to under-secured, in a way that damages and
8 threatens its ability to be repaid, is a
9 consideration.

10 However -- and the Supreme Court in
11 Timbers points this out, that -- that duration of
12 the stay is important. The Morales case, the
13 Timbers case really don't help the Appellants here.
14 That case involved a ten-year note after a plan of
15 reorganization that stripped away the basket of
16 rights that the secured creditor had --

17 THE COURT: The duration is important
18 only if there's not enough time to do the taking.
19 But if there's enough time to take it all then it's
20 gone.

21 MR. LUSKIN: I -- following through
22 that hypothetical, but I must echo what my brethren
23 have stated up here, which is that we are so far
24 away from that kind of situation. The record
25 establishes over-security here. There is cash and

1 cash flow that is more than sufficient to pay the
2 debt service, and certainly during the duration of
3 the stay, from day one of the stay through the end
4 of the day next month, or whenever it ultimately
5 ends.

6 THE COURT: So I think I hear you
7 saying, which makes sense, that it's not just the
8 duration, but it's the duration in relationship to
9 the berm rate here, and if the berm rate
10 (indecipherable) the duration does not create enough
11 to impair the collateral so that it threatens the
12 payment of the debt then --

13 MR. LUSKIN: Correct.

14 THE COURT: -- (inaudible) would have
15 an issue.

16 MR. LUSKIN: Your Honor, yes, that is
17 correct and that is what distinguishes this case.
18 Where we have a perpetual income stream from
19 virtually all, if not all of the cash collateral
20 cases or adequate protection cases that the
21 Appellants cite, many of those cases were real
22 estate cases or equipment cases where the cash
23 collateral, the future rent that was being offered
24 as adequate protection was rent under a lease with a
25 term of years. It was -- in one of the cases there

1 was 13 months rent left and in another of the cases
2 the key tenant was not renewing so the money was
3 going away.

4 So in those cases, if you took away
5 months 1 and 2 of rent, you weren't able to replace
6 them with new loans 13, 14 and 15 as you are in
7 these cases where total revenues are perpetual. And
8 that's -- and the employer contributions are
9 perpetual. And the excise tax and motor vehicle
10 fees that the HTS, the highway bondholders have
11 security interests in. And those numbers and those
12 facts are in the record in the stipulations that
13 were put in to the District Court.

14 I'm not sure -- I've lost track of the
15 time here. I think I'm probably way over. I have
16 one more point that I ask your indulgence.

17 THE COURT: Please make your point.

18 MR. LUSKIN: Okay. I apologize. I'm
19 going to -- I do think the perpetual revenue stream
20 distinguishes these cases from the typical cash
21 collateral situation and the hypothetical that Judge
22 Kayatta has put forward.

23 And I -- I'll end by making the point
24 that the standard that the Oversight Board is
25 advocating is a balancing of a variety of factors

1 without giving any one factor complete priority is
2 not a new or unfamiliar standard. I mean, courts
3 constantly weigh factors to assess cause in many
4 situations where the statute doesn't list them or
5 give examples. PROMESA uses cause in only two
6 instances, one of them is the one we've been talking
7 about, the other one does not list reasons.

8 The bankruptcy code and the bankruptcy
9 rules authorize courts to act for cause or for
10 cause shown in 71 separate spots, by my count, of
11 which reasons or examples are given in only 10. The
12 Federal Rules of Appellate Procedure authorize this
13 Court to act for good cause in seven instances and
14 in none of them is an example given.

15 Courts do not need examples to figure
16 out what the material relevant factors are, and
17 if -- in your hypothetical, if the facts presented
18 are like your hypothetical and constitutional issues
19 are implicated then, yes, that factor may come to
20 the fore.

21 But here, that is not what we have.
22 There is no damage. There is no need for adequate
23 protection. If there were need for adequate
24 protection it's there in the equity cushion and the
25 equity cushion in this case is different because of

1 the perpetual revenue. There's -- I think that
2 absent any further questions from the Court I should
3 stop. I've gone way over my allotment.

4 THE COURT: I have one.

5 MR. LUSKIN: I'm sorry, yes.

6 THE COURT: In terms of the approach
7 that you are advocating to take, I'm sure you read
8 Judge Besosa's Brigade case?

9 MR. LUSKIN: Yes.

10 THE COURT: Are you advocating
11 something more along those lines?

12 MR. LUSKIN: I think Judge Besosa was
13 not as express as I have been in -- in our brief of
14 listing the particular factors. I think in fact,
15 what Judge Besosa did is decide that he has to
16 balance all of the factors and that among the
17 factors that he was required to include or to assess
18 was adequate protection and I think he did that. I
19 would, speaking for the Oversight Board, like to see
20 a decision from this Court is that is more express
21 and that could be -- and more expansive on the
22 balancing that makes it clear that the PROMESA
23 regime pre-petition is different from the bankruptcy
24 regime post-filing of the Title III case for
25 instance, so that in other cases we have guidance

1 and Judge Besosa has more guidance, so yes.

2 THE COURT: Thank you.

3 MR. LUSKIN: Thank you very much.

4 And, again, I apologize for going over.

5 THE COURT: Not at all.

6 MR. BRUNSTAD: Thank you, your Honor.

7 Judge Thompson, there is no evidence in the record
8 whatsoever of an equity cushion for Peaje and its
9 bonds. Zero. Counsel paints a rosy picture that
10 there will be enough money, et cetera, there is zero
11 evidence in the record to substantiate those claims.

12 We didn't have an evidentiary hearing.

13 We had an expert witness who was going to testify
14 about the projections and things, that was not
15 allowed. These bonds are going to go out for
16 19 years. Taking the cash today and spending it is
17 real harm.

18 Judge Kayatta, the burn right now is a
19 hundred percent, they are burning a hundred percent
20 of the cash. Section 405(k) of PROMESA says they're
21 not supposed to be impairing our collateral during
22 the so-called quiet period. They are not
23 maintaining the status quo, they are impairing our
24 collateral yet they're violating the very statute
25 they seek shelter under and saying there's no cause

1 for lifting the stay. Even though they are not
2 complying with the statutory regime they are
3 supposed to be honoring they are impairing our
4 collateral and they are doing it in a way that is
5 causing us harm.

6 Why should they have the burden? They
7 have all of the information. We do not. They know
8 what the protected revenues are. We do not.
9 They -- only they know when they will stop taking
10 our collateral. We don't know, we can't gaze into
11 the crystal ball. They have refused to take a
12 position on when they will stop taking our
13 collateral. They have tipped their hand in this
14 proceeding before the Court. They basically have
15 said "We will continue taking the collateral. We
16 make no commitment to when we'll stop taking the
17 collateral."

18 And they're adequately protected
19 because they have a lawsuit, an unsecured claim.
20 They can sue us later for taking their collateral.
21 But the third circuit said --

22 THE COURT: Counsel, so if there had
23 been a hearing and you had put your expert on --

24 MR. BRUNSTAD: Correct.

25 THE COURT: -- would your expert have

1 simply said "We don't know"?

2 MR. BRUNSTAD: Our expert would have
3 said looking at the -- what information we were able
4 to get from them, the projected revenues may well
5 not be enough to cover all of the future obligations
6 and make up for what they're taking now.

7 Remember, the way this works is cash
8 is being collected, total revenues are being
9 collected and as they come in were supposed to be
10 put into the accounts to make sure there's enough
11 there to make the next payment. They stopped doing
12 that last May. There was enough in there at that
13 time to cover us through this month. But because
14 they're not putting any more of those total revenues
15 in, when we get to July there will be nothing there
16 to pay us. We will be in default. And their
17 argument is, "Well, we'll just continue to take the
18 property and you can sue us later. You can have an
19 unsecured claim a lawsuit against us for taking your
20 property."

21 But as the Third Circuit said in the
22 Rocco case we cite on pages 22 and 23 of our reply
23 brief, "A lawsuit is too speculative in nature to
24 offer adequate protection." And the reason for that
25 is because substituting a lawsuit, a future right to

1 sue is never the same as cash in the bank today.
2 They are going around saying "We don't have enough
3 money to pay anybody, but trust us, we can spend all
4 of your collateral today and we'll pay you in the
5 future." Judge --

6 THE COURT: Yeah, go ahead.

7 MR. BRUNSTAD: You asked us for cites
8 to where we argue that this is going to harm us and
9 it's not going to be enough below.

10 THE COURT: I asked for a cite where
11 you told the judge below that your debt -- the debt
12 itself was not going to get repaid absent release
13 from the stay.

14 MR. BRUNSTAD: Now recall, Judge
15 Kayatta, we were not able to have our evidentiary
16 hearing to come and make our arguments before the
17 Court and --

18 THE COURT: I'm just looking at a very
19 long motion in which you specified the harm, and as
20 I read that harm, you were simply saying that the
21 collateral itself is being reduced. I did not see
22 any claim, and maybe I missed something, which is
23 why I --

24 MR. BRUNSTAD: Let me do the best I
25 can.

1 THE COURT: Okay.

2 MR. BRUNSTAD: I'll give you three
3 cites. The joint appendix page 32, paragraph 43.
4 The joint appendix page 35, paragraph 50. And the
5 joint appendix page 171 at paragraph -- at paragraph
6 4.

7 THE COURT: And then to follow up on
8 Judge Thompson's question, were -- did the judge
9 deny you any discovery that you sought to do?

10 MR. BRUNSTAD: We sought -- we sought
11 to get the financial projections of the revenues,
12 what they were likely to be, so our expert witness
13 could try to prepare and come up and see whether
14 those projections were going to be adequate.
15 Judge -- Judge Besosa, over their objection, did
16 require them to give us those projections about the
17 future revenues. And based upon that evidence, our
18 expert was going to testify that the future revenues
19 are likely to be insufficient to allow us not only
20 to be paid in full going forward, but to make up for
21 what they're spending currently.

22 THE COURT: I think let me ask my
23 question again. Did Judge Besosa deny you any
24 discovery that you tried to do?

25 MR. BRUNSTAD: He did not.

1 THE COURT: Okay.

2 MR. BRUNSTAD: But remember your Honor
3 the key point that I'd like to reiterate, it was our
4 burden to show -- we have a security interest,
5 that's undisputed. It was our burden to show that
6 basically they're taking our collateral, they're
7 dissipating it. That's undisputed. Those are
8 undisputed facts.

9 With that *prima facie* case made, it is
10 their burden to show that it's not causing us any
11 harm. And all you have heard from them today is,
12 "Well, if there's any harm from this you can sue us
13 in the future with a speculative lawsuit", you know,
14 against us, even though they claim they don't have
15 any money. Again, that's not adequate protection.

16 And the reason why it must be their
17 burden to show adequate protection, again is because
18 they have the information -- in addition, one key
19 fact that's necessary to do the calculations is when
20 will they stop taking the collateral? Because,
21 Judge Kayatta, this case is your hypothetical if
22 they just keep taking the collateral into the
23 future. The burden is a hundred percent if
24 they -- if they keep going and going and going and
25 going as they plan --

1 THE COURT: But the regime changes in
2 May at the latest, right?
3 MR. BRUNSTAD: Well, but Judge
4 Kayatta, what happens at that point is we then
5 substitute nearly one stay for another. When they
6 file for bankruptcy they then get the automatic stay
7 and then we have more hearings and more delay so we
8 get one year, two years, perhaps, after the fact
9 where they continue to take our collateral. Each
10 day they continue to take our collateral the hole
11 gets bigger and bigger and bigger and bigger and the
12 problem becomes a problem akin to what happens with
13 poor debtors who get behind on their mortgage
14 payments. They may be able to make the payment in
15 the future, but they never catch up on the arrears,
16 and in the end the collateral isn't going to be
17 sufficient to cover the hole. And again, it's not
18 sufficient, the remedy they suggest is not
19 sufficient, that we can just sue them in the future
20 and get an unsecured claim against them for money
21 damages they basically say they don't have the funds
22 to pay.
23 So taking collateral today without
24 adequate protection is real harm. That's -- under
25 the borrowed canon -- the Borrowed Statute Canon we

1 take the subtle meaning of the adequate protection
2 concept, which was designed to protect secured
3 parties just like Peaje in this case.

4 The balancing test that opposing
5 Counsel advocates is a test under which relief would
6 never be granted, because in their view really the
7 only thing that matters is to have this quiet
8 period. Well, that would be all right --

9 THE COURT: This is beginning to
10 become a run-on sentence.

11 MR. BRUNSTAD: Yes, your Honor. Thank
12 you very much.

13 MS. SOOKNANAN: Your Honor, I just
14 have three brief points in rebuttal. First with
15 respect to the burdens. Whoever bears the burden it
16 is clear that in this case below we met our burden.
17 We showed cause, we showed that we were secured
18 creditors with a lien on property, that they are
19 diverting our property and that we are not
20 adequately protected.

21 THE COURT: Where's the evidence that
22 we should have looked at that would cast serious
23 doubt on the \$19 million per month income stream
24 that is being paid by the non-stay --
25 non-Commonwealth?

1 MS. SOOKNANAN: Your Honor, the
2 evidence is in the stipulated facts itself, it's all
3 the statements by these very entities saying that
4 those contributions are uncertain. They cannot on
5 one hand point to that future revenue stream and
6 point to these hypothetical payments and then say
7 "By the way, those are uncertain, we don't know that
8 they will be paid." And remember, an evidentiary
9 hearing was scheduled in this case.

10 The Commonwealth suggests, goes as far
11 as to say it was incumbent upon us to notify the
12 Court that we had other evidence to submit. That --
13 it's somewhat disingenuous to say that.

14 To understand the timing, a hearing
15 was scheduled for November 3rd. The day before the
16 parties submitted joint stipulations which we had
17 gotten together and agreed to in order to streamline
18 the hearing. Everyone was fully aware that there
19 were other points that parties intended to meet, we
20 notified the Court that morning that there would be
21 expert testimony.

22 So the suggestion that we should have
23 somehow told the Court that we had other evidence,
24 or that it was clear to the Court that these
25 stipulations were the entire record that the parties

1 had agreed to is frankly absurd, these were filed on
2 November 2nd and the hearing was cancelled on
3 November 2nd.

4 THE COURT: But as to the 19 million a
5 month, Mr. Chesley told us that what wasn't
6 uncertain were the non-government contributions.

7 MS. SOOKNANAN: That is -- that is not
8 what we have said, your Honor. The Commonwealth
9 in October in its fiscal plan said that those
10 contributions of municipalities themselves was
11 uncertain. That's what they wrote in their fiscal
12 plan and they are saying here today that they are
13 certain. I mean, they are saying essentially that
14 all secured debt of Puerto Rico will be paid in
15 full.

16 That's what they suggested today and
17 yet they repeatedly say otherwise in pages and pages
18 of their brief talking about how they do not have
19 money to pay their creditors. They do not -- they
20 cannot meet their debts. And neither the
21 Commonwealth nor the ERS addressed today their prior
22 statements that these contributions are uncertain.

23 And with respect to the monthly
24 contributions, your Honor, it's currently
25 \$13.9 million in payments. Those are interest

1 payments only that go through 2020. In 2020,
2 principal payments kick in and that gets bumped up a
3 significant amount.

4 I mean, at the end of the day, there
5 was a hearing scheduled that we were entitled to,
6 statutorily entitled to under PROMESA where we would
7 have an expert testify, where the Commonwealth would
8 put forth evidence on the adequate protection
9 question. And at a minimum we are entitled to that
10 hearing and the District Court (indecipherable). We
11 cancelled the night before it was to be held and on
12 the same day that these stipulated facts were
13 submitted.

14 One more brief point, the
15 Commonwealth -- I apologize if I'm over -- but the
16 Commonwealth has -- you know, in discussing what an
17 extraordinary case would be has said that this Court
18 may not be concerned because what we're dealing with
19 here is money and cash collateral and that can be
20 repaid. And in bankruptcy cash collateral is
21 actually entitled to the most protection because
22 once it's been dissipated and spent there's nothing
23 left. And all that will be left here at the end of
24 it, once they have dissipated and spent her money,
25 as they have admitted, is an unsecured claim. That

1 is not enough. The Constitution requires more.

2 Thank you.

3 THE COURT: After the clerk adjourns
4 us I'd like Counsel to remain at the table, one or
5 more of us is going to come to the well to say
6 hello. There's nothing else, I take it? Well
7 argued. Thank you. We'll do the best we can.

8 (Proceedings concluded.)

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1 STATE OF MICHIGAN)

2) SS

3 COUNTY OF GENESEE)

4 I, Quentina R. Snowden, do hereby state
5 that the foregoing document was reduced to
6 typewritten form by me from digital media, and
7 that it represents a complete, true and correct
8 rendition, to the best of my abilities, of the
9 proceedings held in this cause.

10 I assume no responsibility for any
11 inaudible portions, if any, by any speakers that
12 are not discernible during the proceedings.

13 I further certify that I am not
14 connected by blood, or marriage with any of the
15 parties; their attorneys or agents; and that I am
16 not interested, directly, indirectly, or
17 financially, in the matter of controversy.

18

19 Dated: May 27, 2017

20

21

22 Quintina R. Snowden, CSR-5519

23 Notary Public, Genesee County, Michigan

24 My commission expires: 1/4/2018

25

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